

111TH CONGRESS
1ST SESSION

H. R. 850

To encourage the development of small business cooperatives for healthcare options to improve coverage for employees (CHOICE) including through a small business CHOICE tax credit.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 4, 2009

Ms. VELÁZQUEZ (for herself, Mr. PITTS, Mr. GRAVES, Mr. SHULER, Mr. MORAN of Virginia, and Mr. FATTAH) introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To encourage the development of small business cooperatives for healthcare options to improve coverage for employees (CHOICE) including through a small business CHOICE tax credit.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLES; TABLE OF CONTENTS.**

4 (a) SHORT TITLES.—This Act may be cited as the
5 “Small Business Cooperative for Healthcare Options to

1 Improve Coverage for Employees (CHOICE) Act of 2009”
 2 or as the “Small Business CHOICE Act of 2009”.

3 (b) TABLE OF CONTENTS.—The table of contents of
 4 this Act is as follows:

Sec. 1. Short titles; table of contents.

TITLE I—FULLY FUNDED SMALL BUSINESS HEALTH INSURANCE COOPERATIVES

Sec. 101. Definitions.

Sec. 102. Commission to promote Fully Funded Small Business Health Insurance cooperatives.

Sec. 103. Fully Funded Small Business Health Insurance cooperatives exempted from certain State laws.

Sec. 104. Preservation of State benefit mandates.

Sec. 105. Access to claims reporting data.

TITLE II—SMALL BUSINESS CHOICE CREDIT

Sec. 201. Small Business CHOICE credit.

5 **TITLE I—FULLY FUNDED SMALL** 6 **BUSINESS HEALTH INSUR-** 7 **ANCE COOPERATIVES**

8 **SEC. 101. DEFINITIONS.**

9 For purposes of this title:

10 (1) FULLY FUNDED HEALTH INSURANCE.—The
 11 term “fully funded health insurance” means, with
 12 respect to a fully funded small business health insurance cooperative, insurance provided to assume and
 13 spread a portion, of the risk of insuring the health
 14 liability exposure of the members of such cooperative.
 16

17 (2) FULLY FUNDED SMALL BUSINESS HEALTH
 18 INSURANCE COOPERATIVE.—The term “Fully Fund-

1 ed Small Business Health Insurance cooperative”
2 means a bona fide association or financial coopera-
3 tive organization of persons with a common affili-
4 ation (such as employment, labor union membership,
5 place of residence, industry, or line of business) that
6 form a captive insurance company chartered in a
7 State that has adopted laws and regulations for cap-
8 tive insurers that are materially identical to stand-
9 ards to be developed by the National Association of
10 Insurance Commissioners by July 1, 2010, if each of
11 the following conditions are met:

12 (A) The cooperative—

13 (i) has no fewer than 100 members
14 and no fewer than 5,000 lives (or, begin-
15 ning as of 5 years after the date of the en-
16 actment of this Act, 15,000 lives); or

17 (ii) meets such minimum capital re-
18 quirements as the Secretary shall specify,
19 taking into account recommendations of
20 the commission established under section
21 102.

22 (B) The cooperative administers the activi-
23 ties described in paragraph (1) separately from
24 other activities of the cooperative.

1 (C) The cooperative is chartered or li-
2 censed as a captive insurance company under
3 the laws of a State and is authorized to engage
4 in the business of insurance under the laws of
5 such State.

6 (D) The cooperative does not vary the pre-
7 mium paid for a small business participating in
8 the cooperative based on the health status of in-
9 dividuals for whom such small business pur-
10 chases health insurance, or the claims experi-
11 ence of such small business and does not ex-
12 clude such an individual from coverage based on
13 the health status or claims experience of such
14 individual.

15 (E) The cooperative has as its owners only
16 small businesses—

17 (i) that comprise the membership of
18 the cooperative; and

19 (ii) that are provided excess claims
20 coverage insurance by the cooperative.

21 (F) Ownership, with respect to a member,
22 is shared equitably among all participants in
23 the cooperative.

24 (G) Each owner of a small business par-
25 ticipating in the cooperative contracts with a

1 primary insurer to provide fully insured em-
2 ployee health insurance.

3 (H) The cooperative provides excess claims
4 coverage insurance that does not pay benefits in
5 a year for an insured person until the annual
6 maximum of the policy purchased from the in-
7 surer has been exceeded. The annual maximum
8 of the primary insurance policy shall not be less
9 than \$10,000, and not be more than \$250,000,
10 per insured person in paid claims. The Sec-
11 retary shall provide for an annual increase in
12 the dollar amounts specified in the previous
13 sentence based on annual inflation in health
14 care expenses per capita for such persons.

15 (I) Benefits provided by excess claims cov-
16 erage insurers must meet the high deductible
17 health plan requirements of section
18 223(c)(2)(A)(ii) of the Internal Revenue Code
19 of 1986 for a high deductible health plan pro-
20 vided under applicable State law.

21 (J) The excess claims coverage insurance
22 offered by the cooperative meets all require-
23 ments of State law for the State in which it is
24 offered.

1 (K) The name of the cooperative includes
2 the phrase “Fully Funded Small Business
3 Health Insurance cooperative”.

4 Nothing in this paragraph shall be construed as pre-
5 venting such a cooperative from requiring a small
6 business, as a condition of becoming a member of
7 the cooperative, to have a written commitment to the
8 cooperative for such membership for a period of
9 time.

10 (3) SMALL BUSINESS.—The term “small busi-
11 ness” means a business that—

12 (A) has been classified as a small business
13 concern by the Small Business Administration
14 for purposes of the Small Business Act (15
15 U.S.C. 631 et seq.) under size standards estab-
16 lished under section 3 of such Act (15 U.S.C.
17 632); or

18 (B) has no more than 500 employees, as
19 calculated under section 121.106 of title 13,
20 Code of Federal Regulations, as in effect as of
21 January 1, 2008.

22 (4) STATE.—The term “State” means each of
23 the 50 States, the District of Columbia, and Puerto
24 Rico.

1 **SEC. 102. COMMISSION TO PROMOTE FULLY FUNDED**
2 **SMALL BUSINESS HEALTH INSURANCE CO-**
3 **OPERATIVES.**

4 (a) ESTABLISHMENT.—Not later than January 1,
5 2010, the Secretary of the Treasury, in consultation with
6 the Administrator of the Small Business Administration,
7 shall establish, and provide for the operation of, an inde-
8 pendent commission (in this section referred to as the
9 “commission”) on Fully Funded Small Business Health
10 Insurance Cooperatives consistent with this section.

11 (b) COMPOSITION.—

12 (1) IN GENERAL.—Subject to subparagraph
13 (B), the commission shall be comprised of one rep-
14 resentative from each of the following organizations,
15 as nominated by the organization to the Secretary of
16 the Treasury:

17 (A) The American Academy of Actuaries.

18 (B) The National Association of Insurance
19 Commissioners.

20 (C) The Captive Insurance Companies As-
21 sociation.

22 (D) The Conference of Consulting Actu-
23 aries.

24 (E) The Society of Actuaries.

25 (F) The Actuarial Board for Counseling
26 and Discipline.

1 (G) The Actuarial Standards Board.

2 (2) LIMITATION.—No individual who has a
3 business relationship with an active Fully Funded
4 Small Business Health Insurance cooperative or who
5 is employed by any State, Federal, or local entity
6 may serve as a member of the commission.

7 (3) COMPENSATION.—

8 (A) IN GENERAL.—The Secretary shall
9 provide to members of the commission com-
10 pensation in an annual amount that does not
11 exceed the amount specified in subparagraph
12 (B).

13 (B) LIMITATION.—The amount specified in
14 this subparagraph is \$50,000, or, for a year
15 after 2010, the amount specified in this sub-
16 paragraph for the previous year increased by
17 the annual percentage increase in the consumer
18 price index for all urban consumers for the pre-
19 vious year.

20 (c) FUNCTIONS.—The commission shall—

21 (1) promote the development of Fully Funded
22 Small Business Health Insurance cooperatives;

23 (2) provide for technical assistance in such de-
24 velopment;

1 (3) make recommendations to the Secretary re-
2 garding minimum capital requirements referred to in
3 section 102(2)(A)(ii);

4 (4) conduct oversight of Fully Funded Small
5 Business Health Insurance cooperatives; and

6 (5) make quarterly reports to Congress regard-
7 ing the development, implementation, and mainte-
8 nance of such cooperatives, including the appropriate
9 number of businesses and lives that should be re-
10 quired under section 101(2)(A) and the maximum
11 amount of excess claims coverage insurance that
12 should be provided per covered person.

13 (d) COMMISSION STAFF.—The commission shall pro-
14 vide for such staff, including an executive director, as it
15 determines necessary to carry out its functions.

16 (e) COMMISSION HEADQUARTERS.—The commission
17 shall be domiciled within the District of Columbia.

18 (f) AUTHORIZATION OF APPROPRIATIONS.—There is
19 authorized to be appropriated for purposes of carrying out
20 subsection (a) \$4,000,000 for fiscal year 2010 and
21 \$2,000,000 for each of fiscal years 2011 through 2014.

22 (g) RELATION TO FACA.—The provisions of section
23 14 of the Federal Advisory Committee Act shall not apply
24 to the commission.

1 **SEC. 103. FULLY FUNDED SMALL BUSINESS HEALTH INSUR-**
2 **ANCE COOPERATIVES EXEMPTED FROM CER-**
3 **TAIN STATE LAWS.**

4 (a) IN GENERAL.—Except as provided in this title,
5 a Fully Funded Small Business Health Insurance coopera-
6 tive is exempt from any State law, rule, regulation, or
7 order to the extent that such law, rule, regulation, or order
8 would—

9 (1) prohibit the establishment of a Fully Fund-
10 ed Small Business Health Insurance cooperative;

11 (2) impose any material requirements, proce-
12 dures, or standards (other than solvency require-
13 ments) on a Fully Funded Small Business Health
14 Insurance cooperative that are not generally applica-
15 ble to other entities engaged in a substantially simi-
16 lar business;

17 (3) require that a Fully Funded Small Business
18 Health Insurance cooperative must have a minimum
19 number of members, common ownership or affili-
20 ation, or a certain legal structure;

21 (4) require that any excess claims coverage in-
22 surance policy issued to a Fully Funded Small Busi-
23 ness Health Insurance cooperative or any members
24 of the cooperative be countersigned by an insurance
25 agent or broker residing in the State involved; or

1 (5) otherwise discriminate against a Fully
2 Funded Small Business Health Insurance coopera-
3 tive or any of its members.

4 (b) APPLICATION OF EXEMPTIONS.—The exemptions
5 specified in subsection (a) apply to—

6 (1) excess claims coverage insurance provided
7 to—

8 (A) a Fully Funded Small Business Health
9 Insurance cooperative; or

10 (B) any small business who is a member of
11 a Fully Funded Small Business Health Insur-
12 ance cooperative; and

13 (2) the provision of—

14 (A) excess claims coverage insurance cov-
15 erage;

16 (B) excess claims coverage insurance re-
17 lated services;

18 (C) health management services such as—

19 (i) third party administrators;

20 (ii) disease management;

21 (iii) managed care organizations; and

22 (iv) data warehousing services; or

23 (D) health information technology, includ-
24 ing electronic health records;

1 to a Fully Funded Small Business Health Insurance
2 cooperative or member of the cooperative.

3 (c) REQUIREMENT FOR STATE LICENSURE PER-
4 MITTED.—A State may require that a person acting, or
5 offering to act, as an agent or broker for a Fully Funded
6 Small Business Health Insurance cooperative obtain a li-
7 cense from that State, except that a State may not impose
8 any qualification or requirement which prohibits a licensed
9 resident or nonresident agent or broker from selling within
10 the State.

11 (d) STATE AUTHORITY PRESERVED.—

12 (1) Nothing in this section shall be construed to
13 affect the authority of any State to make use of any
14 of its powers to enforce the laws of such State with
15 respect to which a Fully Funded Small Business
16 Health Insurance cooperative is not exempt under
17 this section.

18 (2) Nothing in this section shall affect the au-
19 thority of any State to bring an action in any Fed-
20 eral or State court.

21 (3) Nothing in this section shall affect any
22 State law regarding prompt payment of benefits.

23 (e) REQUIREMENTS FOR FINANCIAL INFORMA-
24 TION.—Financial information submitted to the State in-
25 surance commissioner by a Fully Funded Small Business

1 Health Insurance cooperative must be certified by an inde-
2 pendent public accountant and must include a statement
3 of opinion on loss and loss adjustment expense reserves
4 made by a certified actuary.

5 (f) FIDUCIARY RESPONSIBILITY.—

6 (1) IN GENERAL.—Each fiduciary (as defined
7 in paragraph (3)(A)) of a Fully Funded Small Busi-
8 ness Health Insurance cooperative shall exercise fi-
9 duciary responsibility (as defined in paragraph
10 (3)(B)) in relation to activities of the cooperative.

11 (2) STATE AND FEDERAL RIGHTS OF ACTION.—

12 (A) LIMITATIONS ON LIABILITY UNDER
13 STATE OR FEDERAL LAW.—In the case of a
14 bona fide association or financial cooperative
15 organization of individuals with a common af-
16 filiation (such as employment, labor union
17 membership, or place of residence) that forms
18 a Fully Funded Small Business Health Insur-
19 ance cooperative in accordance with this Act,
20 such association or organization shall not be lia-
21 ble in any action under State or Federal law for
22 the actions of such cooperative except insofar as
23 the association or organization is acting as a fi-
24 duciary with respect to the cooperative.

1 (B) EXCLUSIVE FEDERAL REMEDY FOR FI-
2 DUCIARY BREACHES.—To the extent that such
3 association or organization exercises control
4 over such cooperative and has breached a fidu-
5 ciary responsibility to its membership in the
6 formation or operation of such cooperative, a
7 member of the association or organization may
8 seek a remedy for such breach only in Federal
9 court.

10 (C) LIMITATION ON VICARIOUS LIABIL-
11 ITY.—A fiduciary shall not be vicariously liable
12 for the actions (including a failure to act) of an
13 agent of the fiduciary in the absence of—

14 (i) actual knowledge of the fiduciary;

15 and

16 (ii) approval or acquiescence by the fi-
17 duciary in the action (or failure to act).

18 (3) DEFINITIONS.—For purposes of this sub-
19 section:

20 (A) FIDUCIARY.—The term “fiduciary”,
21 with respect to a Fully Funded Small Business
22 Health Insurance cooperative—

23 (i) means an officer, agent, or em-
24 ployee of the cooperative; and

1 (ii) includes any other person acting
2 in concert with any such officer, agent, or
3 employee with respect to the cooperative, if
4 such other person has actual notice of such
5 order.

6 (B) FIDUCIARY RESPONSIBILITY.—The
7 term “fiduciary responsibility” means, with re-
8 spect to a fiduciary of a cooperative, acting pru-
9 dently and solely in the interest of the coopera-
10 tive participants, including in the case of ac-
11 tions with respect to the selection and moni-
12 toring of the cooperative’s relationship with a
13 primary insurer and reinsurer.

14 (g) EFFECTIVE DATE.—This section shall apply to
15 Fully Funded Small Business Health Insurance coopera-
16 tive on and after the date of the enactment of this Act.

17 **SEC. 104. PRESERVATION OF STATE BENEFIT MANDATES.**

18 Notwithstanding any other provision of this title a
19 primary health insurer to which this title applies shall not
20 be exempted from benefit mandates under State law.

21 **SEC. 105. ACCESS TO CLAIMS REPORTING DATA.**

22 (a) FEDERAL PREEMPTION.—No law, regulation, or
23 administrative action of a State or political subdivision
24 thereof, or any decision or order rendered by a court under
25 State law, shall have any effect if such law, regulation,

1 or decision conflicts with, hinders, poses an obstacle to or
2 frustrates the purposes of this section.

3 (b) REQUIREMENTS UPON RECEIPT AND REQUEST
4 OF CLAIMS INFORMATION.—

5 (1) IN GENERAL.—Not later than the 30th day
6 after the date a health insurance issuer (as defined
7 in section 2791(b)(2) of the Public Health Service
8 Act), contracted to provide fully funded health insur-
9 ance to members of a Fully Funded Small Business
10 Health Insurance cooperative (referred to in this
11 section as a “Cooperative”), receives a written re-
12 quest for a report of claim information from the fi-
13 duciary (as defined in section 103(f)(3)(A)) of the
14 Cooperative, the health insurance issuer shall pro-
15 vide the report to such fiduciary in accordance with
16 this subsection.

17 (2) LIMITATION ON OBLIGATION.—The health
18 insurance issuer is not obligated to provide a report
19 under this subsection—

20 (A) regarding a particular employer or
21 group health plan more than twice in any 12-
22 month period; or

23 (B) unless the request is made not later
24 than the second anniversary of the date of ter-

1 mination of coverage under a group health plan
2 issued by the health insurance issuer.

3 (3) FORM OF REPORT.—A health insurance
4 issuer shall provide the report of claim information
5 under paragraph (1) through one of the following
6 methods:

7 (A) In written form.

8 (B) Through an electronic file transmitted
9 by secure electronic mail or a file transfer pro-
10 tocol site.

11 (C) By making the required information
12 available through a secure website or web portal
13 accessible by the Cooperative fiduciary.

14 (4) GENERAL CONTENTS OF REPORT.—A re-
15 port of claim information provided under paragraph
16 (1) shall contain all information available to the
17 health insurance issuer that is responsive to the re-
18 quest made under such paragraph, including, subject
19 to paragraphs (6) through (8), protected health in-
20 formation, for the 36-month period preceding the
21 date of the report, or for the entire period of cov-
22 erage, whichever period is shorter.

23 (5) SPECIFIC CONTENTS.—Subject to para-
24 graphs (6) through (8), a report under paragraph
25 (1) shall include the following:

1 (A) Aggregate paid claims experience by
2 month, including claims experience for medical,
3 dental, and pharmacy benefits, as applicable.

4 (B) Total premium paid by month.

5 (C) Total number of covered employees on
6 a monthly basis by coverage tier, including
7 whether coverage was for—

8 (i) an employee only;

9 (ii) an employee with dependents only;

10 (iii) an employee with a spouse only;

11 or

12 (iv) an employee with a spouse and
13 dependents.

14 (D) The total dollar amount of claims
15 pending as of the date of the report.

16 (E) A separate description and individual
17 claims report for any individual whose total
18 paid claims exceed \$10,000 during the 12-
19 month period preceding the date of the report,
20 including the following information related to
21 the claims for that individual:

22 (i) A unique identifying number, char-
23 acteristic, or code for the individual.

24 (ii) The amounts paid.

25 (iii) Dates of service.

1 (iv) Applicable procedure codes and
2 diagnosis codes.

3 (F) A statement describing precertification
4 requests for hospital stays of five days or longer
5 that were made during the 30-day period pre-
6 ceding the date of the report for claims that are
7 not part of the report described by subpara-
8 graphs (A) through (E).

9 (6) PROTECTED HEALTH INFORMATION.—A
10 health insurance issuer may not disclose, in a report
11 of claim information provided under this section,
12 protected health information if the health insurance
13 issuer is prohibited from disclosing such information
14 under the regulations promulgated under section
15 264(c) of the Health Insurance Portability and Ac-
16 countability Act of 1996 (Public Law 104–191). To
17 withhold information in accordance with this para-
18 graph, the health insurance issuer shall—

19 (A) notify the requesting Cooperative fidu-
20 ciary that information is being withheld; and

21 (B) provide to the Cooperative fiduciary a
22 list of categories of claim information that the
23 health insurance issuer has determined are sub-
24 ject to the more stringent privacy restrictions
25 under such regulations.

1 (7) COOPERATIVE FIDUCIARY CERTIFI-
2 CATION.—A Cooperative fiduciary is entitled to re-
3 ceive protected health information under subpara-
4 graphs (E) and (F) of paragraph (5) only after the
5 Cooperative fiduciary makes to the health insurance
6 issuer a certification substantially similar to the fol-
7 lowing: “I hereby certify that the Cooperative will
8 safeguard and limit the use and disclosure of pro-
9 tected health information that is received from the
10 group health plan to perform the plan administra-
11 tion functions.”.

12 (8) INFORMATION AS OF DATE OF TERMI-
13 NATION OF COVERAGE.—In the case of a request
14 made under paragraph (1) after the date of termi-
15 nation of coverage, the report shall contain all infor-
16 mation available to the health insurance issuer as of
17 the date of the report that is responsive to the re-
18 quest, including protected health information, and
19 including the information described in subpara-
20 graphs (A) through (F) of paragraph (5) for the pe-
21 riod described in such paragraph preceding the date
22 of termination of coverage or for the entire policy
23 period, whichever period is shorter. Notwithstanding
24 this paragraph, such a report may not include the
25 protected health information described in subpara-

graph (E) or (F) of paragraph (5) unless a certification has been provided in accordance with paragraph (7).

(c) REQUEST FOR ADDITIONAL INFORMATION.—

(1) IN GENERAL.—On receipt of a report required by subsection (b), the Cooperative fiduciary may review the report and, not later than the 10th day after the date the report is received, may make a written request to the health insurance issuer for additional information in accordance with this subsection for specified individuals.

(2) PROVISION OF ADDITIONAL INFORMATION.—With respect to a request for additional information under paragraph (1) concerning specified individuals for whom claims information has been provided under subsection (b)(5)(E), the health insurance issuer shall provide additional information on the prognosis or recovery if available and, for individuals in active case management, the most recent case management information, including any future expected costs and treatment plan, that relate to the claims for that individual.

(3) TIMELY RESPONSE.—The health insurance issuer shall respond to the request for additional information under this subsection not later than the

1 15th day after the date of receiving the request un-
 2 less the Cooperative fiduciary agrees to a request for
 3 additional time.

4 (4) CERTIFICATION REQUIREMENT.—The
 5 health insurance issuer is not required to produce
 6 the report described by this subsection unless a cer-
 7 tification has been provided in accordance with sub-
 8 section (b)(7).

9 (d) LIMITATION ON LIABILITY FOR DISCLOSURE OF
 10 INFORMATION.—A health insurance issuer that releases
 11 information, including protected health information, in ac-
 12 cordance with this section has not violated a standard of
 13 care and is not liable for civil damages resulting from, and
 14 is not subject to criminal prosecution for, releasing that
 15 information.

16 (e) PENALTIES.—A health insurance issuer that does
 17 not comply with a request for information in accordance
 18 with this section is subject to administrative penalties in
 19 an amount not to exceed \$25,000 per affected individual.

20 **TITLE II—SMALL BUSINESS**

21 **CHOICE CREDIT**

22 **SEC. 201. SMALL BUSINESS CHOICE CREDIT.**

23 (a) IN GENERAL.—Subpart D of part IV of sub-
 24 chapter A of chapter 1 of the Internal Revenue Code of

1 1986 (relating to business related credits) is amended by
2 adding at the end the following new section:

3 **“SEC. 45R. SMALL BUSINESS CHOICE CREDIT.**

4 “(a) IN GENERAL.—For purposes of section 38, the
5 small business CHOICE credit determined under this sec-
6 tion for any taxable year is an amount equal to 65 percent
7 of the amount paid or incurred by the employer for self
8 only or family coverage of an employee under a qualified
9 employer-subsidized health coverage for eligible coverage
10 months beginning in the taxable year.

11 “(b) LIMITATIONS.—

12 “(1) SIZE LIMITATION.—The credit allowed
13 under subsection (a) shall not be allowed with re-
14 spect to more than 100 employees of the employer
15 for any eligible coverage month beginning in any
16 taxable year.

17 “(2) WELLNESS PROGRAM REQUIREMENT.—

18 “(A) IN GENERAL.—The credit allowed
19 under subsection (a) shall not be allowed with
20 respect to coverage of an employee and family
21 members of the employee unless the employer
22 offers a qualified small business wellness pro-
23 gram with respect to such covered employees
24 and such covered family members.

1 “(B) EXEMPTION FOR SINGLE EMPLOYEE
2 FIRMS.—Subparagraph (A) shall not apply to
3 an employer that has only 1 employee.

4 “(c) DEFINITIONS AND SPECIAL RULE.—For pur-
5 poses of this section:

6 “(1) ELIGIBLE COVERAGE MONTH.—The term
7 ‘eligible coverage month’ means any month if—

8 “(A) as of the first day of such month, the
9 employer is a member of a Fully Funded Small
10 Business Health Insurance cooperative and pur-
11 chases excess coverage from such cooperative’s
12 captive insurance company; and

13 “(B) for the month the employee with re-
14 spect to whom the credit is determined is cov-
15 ered under a qualified employer-subsidized
16 health coverage of the employer.

17 “(2) FULLY FUNDED SMALL BUSINESS HEALTH
18 INSURANCE COOPERATIVE.—The term ‘Fully Fund-
19 ed Small Business Health Insurance cooperative’ has
20 the meaning given such term in section 101(2) of
21 the Small Business CHOICE Act of 2009.

22 “(3) QUALIFIED EMPLOYER-SUBSIDIZED
23 HEALTH COVERAGE.—

24 “(A) IN GENERAL.—The term ‘qualified
25 employer-subsidized health coverage’ means any

1 insurance coverage which constitutes medical
2 care under an insurance policy—

3 “(i) which is maintained in conjunc-
4 tion with excess coverage purchased from a
5 fully funded small business captive com-
6 pany and coverage purchased from a li-
7 censed primary insurer;

8 “(ii) which is available to all full-time
9 employees working a minimum of 35 hours
10 per week or its monthly equivalent;

11 “(iii) under which at least the applica-
12 ble percentage of the cost of such coverage
13 (determined under section 4980B) is paid
14 or incurred by the employer;

15 “(iv) under which the percentage of
16 the cost of such coverage paid or incurred
17 by the employer with respect to highly
18 compensated employees (as defined in sec-
19 tion 414(q)) does not exceed the percent-
20 age of such cost paid or incurred by the
21 employer with respect to employees who
22 are not highly compensated employees; and

23 “(v) the primary insurance and excess
24 claims coverage plans are the only plans of

1 the employer to which the employer con-
2 tributes to the cost of coverage.

3 “(B) EXCEPTION FOR CERTAIN COV-
4 ERAGE.—Such term does not include a health
5 plan substantially all of the coverage of which
6 is of excepted benefits described in section
7 9832(c).

8 “(C) APPLICABLE PERCENTAGE.—For
9 purposes of subparagraph (A), the applicable
10 percentage is—

11 “(i) 65 percent, with respect to self
12 only coverage; and

13 “(ii) 35 percent, with respect to fam-
14 ily coverage.

15 “(4) QUALIFIED SMALL BUSINESS WELLNESS
16 PROGRAM.—The term ‘qualified small business
17 wellness program’ means a program which—

18 “(A) is established by an entity with exper-
19 tise in lifestyle management and wellness tools
20 that enable employers and covered individuals
21 to lower health claims and costs while improv-
22 ing the health of such individuals; and

23 “(B) is certified by the Secretary of Health
24 and Human Services, in consultation with per-
25 sons with expertise in employer health pro-

1 motion and wellness programs, as a qualified
2 small business wellness program under this sec-
3 tion.

4 “(5) SMALL EMPLOYER.—

5 “(A) IN GENERAL.—The term ‘small em-
6 ployer’ means, with respect to a taxable year,
7 any employer or sole proprietor which employed
8 an average of 100 or fewer employees on busi-
9 ness days during the preceding calendar year.
10 For purposes of the preceding sentence, a pre-
11 ceding calendar year may be taken into account
12 only if the employer or sole proprietor was in
13 existence throughout such year.

14 “(B) EMPLOYERS AND SOLE PROPRIETORS
15 NOT IN EXISTENCE IN PRECEDING TAXABLE
16 YEAR.—In the case of an employer or sole pro-
17 prietor which was not in existence throughout
18 the preceding calendar year, the determination
19 under subparagraph (A) shall be based on the
20 average number of employees that it is reason-
21 ably expected such employer or sole proprietor
22 will employ on business days in the current cal-
23 endar year.

24 “(6) SPECIAL RULE FOR FIRST YEAR OF PRO-
25 VIDING HEALTH BENEFITS COVERAGE.—In the case

1 of the first taxable year for which an employer or
 2 sole proprietor is allowed a credit under this section,
 3 if the employer or proprietor has not previous to
 4 such taxable year offered any health benefits cov-
 5 erage to any employee, subsection (a) shall be ap-
 6 plied by substituting ‘70 percent’ for ‘65 percent’.

7 “(7) TIME WHEN CONTRIBUTIONS DEEMED
 8 MADE.—A rule similar to the rule of section
 9 219(f)(3) shall apply for purposes of this section.

10 “(8) CONTROLLED GROUPS AND PREDE-
 11 CESSORS.—For purposes of paragraphs (5) and
 12 (6)—

13 “(A) except as provided by the Secretary,
 14 all persons treated as a single employer under
 15 subsection (b), (c), (m), or (o) of section 414
 16 shall be treated as 1 employer; and

17 “(B) any reference to an employer shall in-
 18 clude a reference to any predecessor of such
 19 employer.

20 “(9) ELECTION TO HAVE CREDIT APPLY.—This
 21 section shall apply with respect to a taxpayer for any
 22 taxable year only if there is an election in effect by
 23 such taxpayer (at such time and in such manner as
 24 the Secretary may by regulations prescribe) to have
 25 this section apply for such taxable year. No deduc-

1 tion shall be allowed with respect to amounts paid
 2 by the taxpayer during the taxable year for insur-
 3 ance which constitutes medical care for the taxpayer
 4 or any employee of the taxpayer if such election is
 5 in effect for such taxable year.”.

6 (b) CREDIT TO BE PART OF GENERAL BUSINESS
 7 CREDIT.—Subsection (b) of section 38 of such Code (re-
 8 lating to general business credit) is amended by striking
 9 “plus” at the end of paragraph (34), by striking the period
 10 at the end of paragraph (35) and inserting “plus”, and
 11 by adding at the end the following new paragraph:

12 “(36) the Small Business CHOICE credit de-
 13 termined under section 45R(a).”.

14 (c) CLERICAL AMENDMENT.—The table of sections
 15 for subpart D of part IV of subchapter A of chapter 1
 16 of such Code is amended by adding at the end the fol-
 17 lowing new item:

“Sec. 45R. Small Business CHOICE credit.”.

18 (d) EFFECTIVE DATE.—The amendments made by
 19 this section shall apply to amounts paid for eligible cov-
 20 erage months beginning in taxable years beginning after
 21 December 31, 2009.

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